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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

FERNANDO JUNIOR VALLES,

Defendant and Appellant

F058783

(Super. Ct. No. 08CM2673)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Kings County. James LaPorte, Judge.

Rita Barker, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Julie A. Hokans and J. Robert Jibson, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Levy, Acting P.J., Cornell, J. and Detjen, J.

In case No. 08CM2673 appellant, Fernando Junior Valles, pled no contest to assault with a deadly weapon and by means of force likely to cause great bodily injury (Pen. Code, § 245, subd. (a))¹ and admitted a great bodily injury enhancement (§ 12022.7, subd. (a)). In case No. 09CM1834, Valles pled guilty to possession for sale of methamphetamine (Health & Saf. Code, § 11378).

On August 14, 2009, the court sentenced Valles to an aggregate term of six years eight months in both cases.

On appeal Valles contends the court: 1) violated the terms of his plea bargain in case No. 08CM2673; and 2) erred in imposing a fine pursuant to Government Code section 70373 in case No. 08CM2673. We will affirm.

FACTS

On September 4, 2008, Valles was at a house party in Hanford when he picked a fight with Christian Dominguez. During the altercation, Valles stabbed Dominguez in the left shoulder and on the buttocks with a pocket knife causing two non-life threatening lacerations.

On October 28, 2008, the district attorney filed an information charging Valles with assault with a deadly weapon and by means of force likely to produce great bodily injury (§ 245, subd. (a)(1)), a great bodily injury enhancement (§ 12022.7, subd. (a)), and a personal use of a knife enhancement (§ 12022, subd. (b)(1)).

On June 16, 2009, Valles entered his no contest plea to the assault charge and admitted the great bodily injury enhancement in exchange for the dismissal of the remaining enhancement and a maximum sentence of six years.

At a hearing on July 15, 2009, the court announced that Valles had a new case involving violation of Health and Safety Code sections 11378 and 11377. The following colloquy then occurred:

¹ All further statutory references are to the Penal Code, unless otherwise indicated.

“THE COURT: All right, I have a new 09 case, it looks like it arises out of [Health and Safety Code sections]11378 and 11377. He had posted bail, it’s assigned to this Court. We have a bail review and trial setting scheduled for this date.

“MS. WINSPUR [DEFENSE COUNSEL]: That’s correct, your Honor. At this time it’s my understanding that Mr. Valles will be pleading guilty to the [Health and Safety Code section]11378, it’s Count 1 in the new case, and that will be an agreement of an additional eight months for a stipulated sentence of three years, eight months and we would be requesting immediate sentencing.

“MS. LEE [THE PROSECUTOR]: Your Honor, its two years mitigated -- what the Probation recommended -- the Probation Department is recommending on the original case, the 08CM2673, is the mitigated sentence for the 245 of two years plus the three years for the great bodily injury for a total of five years. Am I wrong?

“THE COURT: That’s what the report says. Now, is there a --

“MS. LEE: And the agreement for the new case, 09CM1834, was eight months consecutive.

“MS. WINSPUR: Consecutive.

“MS. LEE: For [Health and Safety Code section] 11378. So that would be a total of five years, eight months if the Court followed the recommendation of probation.

“MS. WINSPUR: Could we trail this matter?

“THE COURT: Absolutely.”

The matter was trailed and when it was recalled defense counsel informed the court that Valles was “attempting to hire an attorney to withdraw his plea.” After some discussion, the court granted defense counsel’s request for a continuance.

At a hearing on July 24, 2009, defense counsel informed the court that Valles had not yet been able to retain private counsel. After the court heard and denied Valles’s *Marsden*² motion, the court nevertheless appointed Attorney Donna Tarter to represent

² *People v. Marsden* (1970) 2 Cal.3d 118.

Valles for the purpose of determining whether Valles had a basis for filing a motion to withdraw plea.

At hearing on August 14, 2009, the court ordered Attorney Winspur to resume representing Valles after Attorney Tarter informed the court that she did not find any basis for making a motion to withdraw plea on Valles's behalf. The court then trailed the matter.

When the matter was called again, Defense Counsel Winspur informed the court she was not sure they had a resolution on the drug case. The court again trailed the matter to allow defense counsel additional time to speak with Valles. When the matter resumed, the following colloquy occurred:

“THE COURT: Mr. Valles, your attorney has told me that you're planning on pleading to count 1, [Health and Safety Code section] 11378 in Case 09CM1834, *that would add eight months, to a six year sentence in 08CM2673, and so it would be a total of six years, eight months, and then all the other counts in 09CM1834 would be dismissed.*

“MS. WINSPUR: *That's correct, your Honor.*

“THE COURT: Has she talked to you about these issues?

“THE DEFENDANT: Yes.

“THE COURT: Okay, have you had sufficient time to discuss the matter with her? Mr. Valles, [have] you had sufficient time to talk with her about it?

“DEFENDANT: Yes.

“THE COURT: Okay, all right, what I'm going to do is I'm going to take the plea in 09CM1834, *then I'm going to sentence you in that case, as well as 08CM2673 per the agreement, okay? Do you understand what we're about to do?*

“THE DEFENDANT: *Yes.*

“THE COURT: Okay. First in 09CM1834, if you plead to [Health and Safety Code section] 11378, which was you possessed for sale methamphetamine on the 9th day of January, 2009, the triad is sixteen months, two years or three years, meaning you could be sentenced

independently up to three years to state prison. However, since it's going to be a subordinate term, it will be one-third the mid term, or eight months, one-third of 24 months is eight months, okay? So do you understand that as a possible consequence to the plea in this case?

"THE DEFENDANT: Yes." (Italics added.)

Later the following colloquy occurred:

"THE COURT: All right, as I understand it, there's a sentencing and a plea agreement. The plea agreement is you'd be pleading to Count 1, which is the [Health and Safety Code section] 11378, and the People are going to be dismissing Counts 2 and 3, Count 2 is the possession of controlled substance, meth, oh and an out-on-bail enhancement, and Count 3 is a misdemeanor possession of marijuana. That out-on-bail enhancement would carry --

"MS. WINSPUR: Two.

"THE COURT: -- normally two years?

"MS. WINSPUR: Yes.

"MS. MCKITTRICK [THE PROSECUTOR]: Yes, sir.

"THE COURT: All right, so they're going to dismiss that case -- that count, as well as the other possession of a controlled substance count and all the enhancements, and so you'll only be pleading to Count 1.

"[¶] ... [¶]

"THE COURT: All right. *The sentencing agreement is that you're going to be receiving eight additional months to run consecutive to the sentence you're going to receive in 08CM2673. There's an agreement that you're going to be receiving six years in that case and eight months in the newest case.* Do you understand that is the plea and sentencing agreement?

"THE DEFENDANT: *Yes.*

"THE COURT: Okay. Do you have any questions about that?

"THE DEFENDANT: *No.*" (Italics added.)

The court then took Valles's guilty plea to the possession for sale charge. After defense counsel waived time for sentencing, the following exchange occurred:

“THE COURT: Here the report on 08CM2673 was filed on July the 10th, 2009, more than five days prior to this date. The probation officer recommended that the sentence be five years aggregate. *There’s a stipulation that it be six years, plus eight months.*

“MS. WINSPUR: *Correct, your Honor.*

“THE COURT: The mitigated term in 08CM2673 is two years, instead it will be three years, the mid term, and then there will be three years for the 12022.7(a), which is assault upon a person with a deadly weapon, specifically a knife, personal infliction of great bodily injury. All right, so *Count 1 will be an aggregate of the three year mid term plus the three years for the 12022.7*, which is the use of the knife -- I’m sorry, personal infliction of GBI with the knife, a felony, *and then he will be receiving eight months consecutive in 09CM1834 for Count 1*, which is the drug charge [Health and Safety Code section]11378.

“Do you want to be heard?

“MS. WINSPUR: No, your Honor.

“MS. McKITTRICK: Submit it.” (Italics added.)

The court then sentenced Valles to an aggregate term of six years eight months: the middle term on Valles’s assault conviction in case No. 08CM2673, a three-year term for the great bodily injury enhancement in that case, and a consecutive eight-month term for Valles’s drug conviction in case No. 09CM1834, one-third the middle term of two years for that offense. The court also imposed a separate \$30 court security fee pursuant to Government Code section 70373 on each of Valles’s convictions.

DISCUSSION

Valles’s Plea Bargain

Valles contends that by treating the six-year term in case No 08CM2673 as a stipulated, aggregate term rather than a maximum, aggregate term for that case, the court violated his plea bargain. Alternatively, he contends that his defense counsel provided ineffective representation by agreeing with the court that the plea bargain in case No. 08CM2673 provided for a stipulated, instead of a maximum aggregate six-year term. We will reject these contentions.

““‘[W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.’ [Citation.] [¶] The Supreme Court has thus recognized that due process applies not only to the procedure of accepting the plea [citation], but that the requirements of due process attach also to implementation of the bargain itself. It necessarily follows that violation of the bargain by an officer of the state raises a constitutional right to some remedy.’ [Citations.]” (*People v. Walker* (1991) 54 Cal.3d 1013, 1024.)

““As a general rule, a plea bargain approved by the court is enforceable under contract principles. [Citations.]’ [Citation.] However, ‘[i]n addition to their contractual qualities, plea agreements also have a constitutional dimension. A criminal defendant’s constitutional due process right is implicated by the failure to implement a plea bargain according to its terms. [Citations.]’ [Citations.]” (*People v. Scheller* (2006) 136 Cal.App.4th 1143, 1152.)

The record shows that Valles’s original plea bargain in case No. 08CM2374 provided for a maximum aggregate term of six years.³ On July 15, 2009, after the court announced that Valles had a new drug case pending, the parties informed the court that there was a new agreement in both cases. The agreement provided that Valles would plead to the possession for sale of methamphetamine offense in the new case and receive an eight-month term, which he would serve consecutive to the five- or six- year aggregate term he would receive in case No. 09CM1834. However, after a break in the proceedings, Valles implicitly rejected the new plea bargain covering both cases when he advised his defense counsel that he was going to attempt to retain private counsel. The court then continued the matter.

On July 24, 2009, Valles had not yet obtained private counsel and the court appointed substitute counsel Donna Tarter for the purpose of determining whether Valles had a basis for filing a motion to withdraw plea.

³ The court could impose the maximum term under Valles’s original agreement by imposing the middle term of three years on his assault conviction and a three-year great bodily injury enhancement.

On August 14, 2009, after Defense Counsel Tartar informed the court she did not find any basis for filing a motion to withdraw plea, Defense Counsel Winspur resumed representing Valles. The court trailed the matter twice after Defense Counsel Winspur informed the court they still needed to deal with the pending drug case. By the time the matter was again called, the parties had apparently worked out a new agreement in both cases that superseded the original agreement in case No. 08CM2673. (Rest., Contracts § 279 [“(1) A substituted contract is a contract that is itself accepted by the obligee in satisfaction of the obligor’s existing duty. [¶] (2) The substituted contract discharges the original duty”].) This agreement provided that Valles would receive a stipulated six-year term in case No. 08CM2673 and a consecutive eight-month term on his possession of methamphetamine conviction in case No. 09CM1834. Further, it is clear from the responses of Valles and defense counsel to the court during the change of plea proceedings for case No. 09CM1834 that Valles and defense counsel both accepted the substitution of the original agreement with the new agreement that covered both cases. Accordingly, since the court sentenced Valles in accord with the substituted plea agreement covering both cases, we reject Valles’s contention that the court violated his plea bargain when it sentenced him in both cases.

Nor is there any merit to Valles’s ineffective assistance of counsel claim.

“In order to establish a claim of ineffective assistance of counsel, defendant bears the burden of demonstrating, first, that counsel’s performance was deficient because it “fell below an objective standard of reasonableness [¶] ... under prevailing professional norms.” [Citations.] Unless a defendant establishes the contrary, we shall presume that “counsel’s performance fell within the wide range of professional competence and that counsel’s actions and inactions can be explained as a matter of sound trial strategy.” [Citation.] If the record “sheds no light on why counsel acted or failed to act in the manner challenged,” an appellate claim of ineffective assistance of counsel must be rejected “unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation.” [Citations.] If a defendant meets the burden of establishing that counsel’s performance was deficient, he or she also must show that counsel’s deficiencies resulted in prejudice,

that is, a “reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” [Citation.]’ [Citation.]” (*People v. Lopez* (2008) 42 Cal.4th 960, 966 (*Lopez*).)

Valles contends that Defense Counsel Winspur provided ineffective representation because at the August 14, 2009, sentencing hearing she agreed with the court that the plea bargain in case No. 08CM2673 included a stipulated six-year term. However, as discussed above, the record indicates that the original plea agreement in case No. 08CM2673 was superseded by the August 14, 2009, plea agreement. This new plea agreement covered both cases and provided for a stipulated, aggregate six-year term in case No. 08CM2673, a consecutive eight-month term in case No. 09CM1834, and the dismissal of the remaining counts and allegations in both cases. Further, since the record does not show any prejudice to Valles or shed any light on why defense counsel agreed to the second plea agreement, in accord with *Lopez*, we reject Valles’s ineffective assistance of counsel claim.

The Government Code Section 70373 Assessment

Government Code section 70373 was enacted in 2008 and became effective on January 1, 2009. (Gov. Code, § 70373, added Stats. 2008 ch. 311, § 6.5.) This code section in pertinent part provides:

“To ensure and maintain adequate funding for court facilities, an assessment shall be imposed on every conviction for a criminal offense, including a traffic offense, except parking offenses as defined in subdivision (i) of Section 1463 of the Penal Code, involving a violation of a section of the Vehicle Code or any local ordinance adopted pursuant to the Vehicle Code. The assessment shall be imposed in the amount of thirty dollars (\$30) for each misdemeanor or felony” (Gov. Code, § 70373, subd. (a)(1).)

Valles contends that the court violated ex post facto principles when it imposed a \$30 assessment pursuant to this section on his assault conviction because he committed this offense prior to the effective date of Government Code section 70373. This court recently held that Government Code section 70373 applies from the date of a defendant’s conviction, not the date the offense was committed. (*People v. Phillips* (2010) 186

Cal.App.4th 475, 477-479; see also *People v. Castillo* (2010) 182 Cal.App.4th 1410, 1413-1415.) We find these cases controlling and apply their holdings here.

DISPOSITION

The judgment is affirmed.